UNITED NATIONS

GENERAL

ASSEMBLY

Distr.
LIMITED

A/CN.9/WG.II/WP.76
16 October 1992

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on
International Contract Practices
Eighteenth session
Vienna, 30 November - 11 December 1992

INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Revised articles of draft Convention on international guaranty letters

Note by the Secretariat

CONTENTS

		Page
INTRODUCTION		2
CHAPTER I.	SPHERE OF APPLICATION	3
Article 1.	Substantive scope of application	3
Article 2.	Guaranty letter	4
Article 3.	Independence of undertaking	5
Article 4.	Internationality of guaranty letter	7
CHAPTER II.	INTERPRETATION	8
Article 5.	Principles of interpretation	8
Article 6.	Rules of interpretation and definitions	8
CHAPTER III.	EFFECTIVENESS OF GUARANTY LETTER	10
Article 7.	Establishment of guaranty letter	10
Article 8.	Amendment	10
Article 9.	Transfer of rights	11
Article 9 bis	Assignment of proceeds	13
Article 10.	Cessation of effectiveness of guaranty letter	14
Article 11.	Expiry	16

[Revised articles on rights, obligations and defences, and on court measures, jurisdiction, and conflict of laws will be presented in an addendum to this note]

8008T V.92-57688

INTRODUCTION

1. The Working Group on International Contract Practices examined at its sixteenth session draft articles 1 to 13 and at its seventeenth session draft articles 14 to 27 of a uniform law on international guaranty letters prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add. 1). The deliberations and conclusions of the Working Group are set forth in the reports of the Working Group on those two sessions (A/CN.9/358 and 361). The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 1 to 27.

2. The present note has been prepared pursuant to that request. It presents revised articles on sphere of application, interpretation and effectiveness of guaranty letter. Revised articles on rights, obligations and defences, and on court measures, jurisdiction and conflict of laws will be presented in an addendum to this note. The style of presentation is the same as that used in previous drafts and explained in paragraphs 3 and 4 of the introduction to document A/CN.9/WG.II/WP.73.

REVISED ARTICLES OF DRAFT CONVENTION ON INTERNATIONAL GUARANTY LETTERS

CHAPTER I. SPHERE OF APPLICATION

Article 1. Substantive scope of application [1]

This Convention [2] applies to international guaranty letters [3] [issued in a Contracting State] [4].

Remarks

1. The article heading should be modified to read "Scope of application" if the suggested addition of a territorial connecting factor would be accepted (see remark 4).

2. The term "Convention" is used here and in other provisions of the draft text following the Working Group's decision "to proceed on the working assumption that the final text would take the form of a convention without thereby precluding the possibility of reverting to the more flexible form of a model law at the final stage of the work when the Working Group would have a clear picture as to the provisions included in the draft text" (A/CN.9/361, para. 147).

3. Despite a concern expressed at the sixteenth session that the term "guaranty letter" did not embrace the stand-by letter of credit, the term has been retained in view of the Working Group's conclusion that it would be premature to take a final decision on the nominal issue of a common name (A/CN.9/358, para. 15). In an effort to meet that concern, revised article 2 defines the term expressly as embracing the independent guarantee and the stand-by letter of credit; that clarification might also be included in article 1. If the Working Group were in favour of establishing a clear dichotomy between these two types of guaranty letters, consideration might be given to specifying the applicability of the Convention to independent guarantees and stand-by letters of credit, providing separate definitions for these two types and using a simple, generic term (e.g. "banker's undertaking" or "assurance") as a common name to be used in those provisions applicable to both types.

4. The wording between square brackets has been added to solicit consideration of the issue of the territorial scope of application, based on the working assumption that the final text would be adopted in the form of a convention. Amongst the questions to be considered would be whether a territorial link with a Contracting State should be required and, if so, whether the tentatively suggested criterion of the place of issuance is appropriate. The answers to those questions, particularly the first one, will have implications on, and should thus be considered in conjunction with, possible provisions on conflict of laws (see draft articles 26 and 27 and accompanying remarks).

Article 2. Guaranty letter

(1) A guaranty letter is an independent undertaking [1] [,in the form of a demand guarantee or bond or in the form of a stand-by letter of credit,] [2] given by a bank or other institution or person (["issuer"] ["guarantor"]) [3] to pay to another person ("beneficiary") [or, if so stipulated in the undertaking, to itself acting as a fiduciary or through another branch] [4] a certain or determinable amount of a specified currency or unit of account [or other item of value] [or to accept a bill of exchange for a specified amount] [5] in conformity with the terms and [any documentary] conditions [6] of the undertaking when so demanded in the manner prescribed in the undertaking [7].

(2) The undertaking may be given

(a) at the request or on the instruction of the customer ("principal") of the issuer ("direct guaranty letter"),

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal") of that instructing party ("indirect guaranty letter"), or

(c) on behalf of the issuer itself ("guaranty letter on issuer's own behalf").

Remarks

1. It may be noted that the Working Group decided at its sixteenth session to maintain the reference to the "essentially documentary" character between square brackets as a reminder and to reconsider the issue at a later stage (A/CN.9/358, para. 21). However, that controversial reference has not been maintained in this draft article, in view of the later agreement of the Working Group "that the provisions in the uniform law should focus on instruments containing only documentary conditions" (A/CN.9/358, para. 61). As to an alternative suggestion for introducing the documentary character into the definition of "guaranty letter", see below, remark 6.

2. The reference to demand guarantees or bonds and to stand-by letters of credit has been included here for consideration by the Working Group for the reason set forth in remark 3 to article 1.

3. As regards the reference to the "guarantor" or "issuer" between square brackets, the Working Group decided at its sixteenth session to leave the matter to the drafting group that would be set up at a later session. However, the revised draft suggests a certain preference for the term "issuer" by inverting the order of the alternative terms in this draft article and by using in later articles only the term "issuer". There are at least three reasons for that preference: the term "issuer" is used in stand-by letter of

credit practice; the term "guarantor" might be misunderstood as embracing the issuer of an accessory guarantee; and the term "issuer" appears to be closer to the respective term used in the context of guarantees in a number of languages, including non-official languages. In consideration of the first reason, it is submitted that the proponents of stand-by letter of credit terminology could accept the retention of the term "principal" rather than insist on the term "applicant".

4. The wording between square brackets is modelled on draft article 6(6) of the United States proposal (A/CN.9/WG.II/WP.77). If its substance were to be adopted by the Working Group, consideration might be given to presenting it as a separate rule of interpretation in article 6.

5. The revised text does not retain the previous reference to "negotiation without recourse", taking into account the objections raised at the sixteenth session (A/CN.9/358, para. 33). However, consideration might be given to adding the wording "or to incur a deferred payment obligation" as suggested in the United States proposal, article 2(1).

6. The reference to "documentary conditions" has been inserted in view of the Working Group's agreement to focus on instruments containing only documentary conditions (A/CN.9/358, para. 61). The qualifier "any" has been added with a view to clearly embracing simple demand guarantees and clean stand-by letters of credit. The reference to the documentary nature of the conditions has been placed between square brackets since it might not be needed in view of revised draft article 3. Moreover, it might not be appropriate if the provisions of draft article 3(1)(b) and (2) were adopted.

7. It may be noted that Variants X and Y of previous draft article 2 have not been retained in the revised article. However, their substance has been included in other articles, i.e. articles 3(3) and 14.

Article 3. Independence of undertaking

(1) [For the purposes of this Convention,] an undertaking is [deemed to be] independent if:

(a) it provides for payment upon demand and presentation of any specified documents [,without any verification of facts that are outside the operational purview of the issuer];[1]

or

(b) it contains [as its heading and] within its text the words "Stand-by letter of credit" or "Demand guarantee" [or "Independent documentary promise" or "International guaranty letter"].[2]

(2) Where an undertaking referred to in paragraph (1)(b) of this article provides for payment upon the occurrence of a future uncertain event without specifying the documentary means for establishing that occurrence, payment is due only upon certification of that occurrence by the beneficiary [or the principal] [3], unless its verification falls within the operational purview of the issuer. The same rule applies to any non-documentary condition for the effectiveness of a guaranty letter or for the [reduction or increase] [adjustment] of its amount.

(3) While the purpose of an undertaking covered by this Convention [would ordinarily be] [may be] to secure the beneficiary against the non-fulfilment of certain obligations by the principal or against another contingency, the undertaking is not subject to, or qualified by, any underlying transaction or other relationship, even if referred to in the undertaking, [4] and the payment obligation does not depend on the [ultimate] determination of the occurrence of that contingency but solely on the presentation of any documents required in the undertaking or by paragraph (2) of this article. [The same rule applies to a counter-guaranty letter in respect of the contingency of the beneficiary of the counter-guaranty letter being demanded to pay under its guaranty letter.] [5].

Remarks

1. Paragraph (1) of completely revised draft article 3 describes the types of undertakings covered by the Convention. Retaining the concept of independence known in all legal systems, it defines as independent, in subparagraph (a), all undertakings not containing any non-documentary condition of payment, thus reflecting the Working Group's agreement to focus on instruments containing only documentary conditions (A/CN.9/358, para. 61).

2. Subparagraph (b) is intended to provide a "safe haven" in terms of certainty of the Convention's application. It is submitted that the benefits of certainty outweigh the possible disadvantages of the suggested provision, including the need for changing practice by requiring new labels, especially if one of those labels between square brackets were adopted. Apart from its main purpose of providing certainty, the provision might operate as an opting-in provision for some instruments that contain a non-documentary condition. It is in view of that possibility that paragraph (2) provides for conversion of any such condition into a documentary one. The result is, as summed up in paragraph (3), that no undertakings would be covered by the Convention that would require issuers to verify any facts outside their purview.

3. The reference to the principal might usefully be added in view of the fact that for many contingencies certification by the principal puts matters beyond doubt, although an exception would have to be made for the rule in the second sentence of paragraph (2) as regards the reduction of the amount of the guaranty letter. However, it should be clear that the issuer does not have the right to choose between the principal and the beneficiary but must be content with the certification by either of them. It may also be noted that the mode of conversion imposed by paragraph (2) would not be applicable if the issuer and the beneficiary agree on another documentary means of establishing the occurrence of the contingency and thus amend the guaranty letter.

4. Consideration might be given to adding wording to the effect that neither the issuer nor the beneficiary may invoke any defence arising from a relationship other than that created between them by the undertaking. If such clarifying wording were to be added it might be appropriate to add also the last sentence of previous draft article 3(1): "The independent character of an undertaking is not affected by the fact that the issuer, as provided in article 17(1)(c), may raise certain objections to payment that might be based on facts relating to any such other relationship".

5. The sentence between square brackets is not absolutely necessary since its substance is already included in the first sentence that covers all undertakings, including those of counter-guarantors. However, it might help to emphasize the independent nature of the counter-guaranty letter, as, for example, done in article 2(c) of the ICC Uniform Rules for Demand Guarantees (URDG - 458). For a definition of counter-guaranty letter see article 6(d).

Article 4. Internationality of guaranty letter [1]

(1) A guaranty letter is international if:

(a) the places of business specified in the guaranty letter of any two of the following persons are in different States: issuer, beneficiary, principal, instructing party [,adviser] [2] or confirmer; or

(b) it expressly states that it is international or that it is subject to [generally recognized] international rules or usages of guarantee or letter of credit practice. [3]

(2) For the purposes of the preceding paragraph:

(a) if the guaranty letter lists more than one place of business of a given party, the place of business is that which has the closest relationship to the guaranty letter;

[(b) if the guaranty letter does not specify a place of business for a given party but specifies its habitual residence, that residence is relevant for determining the international character of the guaranty letter.] [4]

Remarks

1. It may be recalled that the Working Group has previously discussed, and left open the final decision on, whether the uniform law should extend to domestic transactions (A/CN.9/358, para. 66). If the prevailing view were in favour of such extension, consideration might be given to including in the draft Convention a reservation that would allow States to limit its application to international guaranty letters.

2. As suggested in the United States proposal (article 4(1)(a)), the term "adviser" has been added to reflect stand-by letter of credit practice, although the practical effect of that addition would probably be limited. If the addition is based on the assumption that the adviser's place of business is often the place of payment, consideration might be given to referring directly to the place of payment as one of the places relevant for determining internationality.

3. Subparagraph (b) presents two ways of fulfilling, by means of a statement, the internationality requirement as a condition of the Convention's application. If, as suggested at the sixteenth session for the uniform law (A/CN.9/358, para. 70), a straightforward opting-in provision would be preferred to the provision in subparagraph (b), such opting-in provision might be added to article 1 along the following lines: "and to any guaranty letter that states that it is subject to this Convention".

4. Revised paragraph (2)(b) has been adjusted to the rule adopted in paragraph (1)(a). It has been placed between square brackets with a view to soliciting consideration of whether such a rule relating to habitual residence is necessary.

CHAPTER II. INTERPRETATION

Article 5. Principles of interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international guarantee and stand-by letter of credit practice.

Article 6. Rules of interpretation and definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "guaranty letter" includes "counter-guaranty letter" and "confirmation of guaranty letter", and "guarantor" includes "counter-guarantor" and "confirmer";

(b) any reference to the guaranty letter or the undertaking of the issuer, or to its terms and conditions, is to the text as originally established in accordance with article 7 or, if later amended in accordance with article 8, to the text in its last amended version;

(c) where a provision of this Convention refers to a possible agreement or stipulation of the parties, the parties meant are the issuer and the beneficiary of the guaranty letter in question;

(d) "counter-guaranty letter" means a guaranty letter given to the issuer of another guaranty letter by its instructing party [or to the issuer of another guarantee or letter of credit] [1] and providing for payment upon demand and presentation of any specified document [2] stating that payment [under that other guaranty letter or undertaking] has been demanded from, or made by, the beneficiary of the "counter-guaranty letter";

(e) "counter-guarantor" means the issuer of a counter-guaranty letter;

(f) "confirmation" of a guaranty letter means an independent undertaking added to that of the issuer providing the beneficiary with the option of demanding payment and, unless expressly stipulated otherwise, presenting any required documents to the confirmer [instead of to the issuer] [3];

(g) "confirmer" means the person confirming a guaranty letter;

(h) "document" means a communication made in a form that provides a complete record thereof [and is authenticated as to its source by generally accepted means or by a procedure agreed with the recipient] [4].

Remarks

1. The wording between square brackets is designed to embrace guaranty letters that back, or ensure reimbursement of, undertakings of the beneficiary other than guaranty letters such as accessory guarantees or commercial letters of credit. However, it is difficult to find wording that is sufficiently precise so as not to embrace too many types of undertakings, e.g. insurance obligations.

2. The reference to documents specified in the counter-guaranty letter might have to be modified if the suggested provisions of draft article 3(1)(b) and (2) were adopted.

3. It is submitted that the suggested definition of "confirmation" of guaranty letters is suitable for bank guarantees as well as stand-by letters of credit. See, however, the suggested definition of "confirmer" in the United States proposal which includes the requirement of an authorization by the issuer.

4. The suggested definition of "document" is modelled on article 7 that sets forth the form requirement for the establishment of the guaranty letter and it has the effect of excluding purely oral communications. The reference to authentication has been placed between square brackets so as to solicit consideration of whether that requirement is appropriate for all documents envisaged by the Convention.

CHAPTER III. EFFECTIVENESS OF GUARANTY LETTER

Article 7. Establishment of guaranty letter

(1) A guaranty letter may be established in any form which preserves a complete record of the text of the guaranty letter and provides authentication of its source by generally accepted means or by a procedure agreed upon by the parties.

(2) Variant A Unless otherwise stated therein, a guaranty letter becomes effective and irrevocable when it leaves the issuer's sphere of control ("issuance"). [1]

Variant B A guaranty letter becomes effective and [, unless it expressly states that it is revocable,] irrevocable when it is issued, provided that it does not state a different time of effectiveness [2].

Remarks

1. As suggested at the sixteenth session (A/CN.9/358, para. 81), a definition of the term "issuance" has been incorporated in Variant A. If Variant B were to be adopted, such a definition could be included in article 6.

2. Consideration might be given to formulating the proviso in a more elaborate manner along the lines of the second sentence of Variant X of previous draft article 7(2). If a reference to conditions of effectiveness were to be included, account would have to be taken of the decision on article 3(1) and (2) concerning the possibility of non-documentary conditions of effectiveness and their conversion into documentary ones.

Article 8. Amendment

(1) A guaranty letter may be amended in the form agreed upon by the parties or, failing such agreement, in any form referred to in paragraph (1) of article 7.

(2) The amendment becomes effective, unless a different time of effectiveness is stated in the amendment or has been agreed upon by the parties,

Variant A when it is issued [by the issuer], provided that it consists solely of an extension of the validity period of the guaranty letter; any other amendment becomes effective when the issuer receives a notice of acceptance by the beneficiary, unless a different time of effectiveness is stipulated.

Variant B when it is issued, unless the issuer receives a notice of rejection by the beneficiary within [ten] [business] days.

[(2 bis) An amendment affects the confirmation of a guaranty letter only if the confirmer consents to the amendment.] [1]

[(3) Variant Y The provisions of paragraphs (1) and (2) of this article do not entitle the issuer to invoke the amendment in support of any claim for reimbursement against the principal if the issuer failed to obtain the consent of the principal required by agreement or law.

Variant Z When issuing an amendment, the issuer shall promptly dispatch a copy thereof to the principal.]

Remarks

1. New paragraph (2 bis) has been added with a view to underlining the independent nature of the confirmer's undertaking.

Article 9. Transfer of rights

Variant A The beneficiary's right to demand payment under the guaranty letter may be transferred only if so, and to the extent and in the manner, [1] authorized in the guaranty letter. [2]

Variant B (1) The beneficiary's right to demand payment under the guaranty letter may not be transferred unless so expressly authorized by the issuer in the guaranty letter [or by prior consent in a form referred to in paragraph (1) of article 7] [3].

(2) Partial or successive transfers are permitted only if so expressly authorized by the issuer.

(3) If a guaranty letter is designated as "transferable" [, or contains words of similar import,] without specifying whether or not the consent of the issuer [or another authorized person] is required for the actual transfer,

Variant X — the issuer must, and any other authorized person may, within the limits of the authorization [effect] [implement] the transfer. [4].

Variant Y — no such consent is needed. [5]

Variant Z — neither the issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it. [6]

Remarks

1. It is submitted that the inserted reference to the extent and manner of the transfer authorized in the guaranty letter covers such issues of detail as whether partial or successive transfers are permitted. However, the reference might be viewed as too general or abstract; for that reason, a more detailed alternative is presented in Variant B, especially its paragraph (2).

2. The reference to authorization in the guaranty letter which, according to article 6(b), includes any amendment, appears to be sufficiently comprehensive, provided that no other form of consent would be envisaged. However, it might not clearly determine the question addressed in paragraph (3) of Variant B, namely whether in addition to the authorization in the guaranty letter a consent to the actual transfer request is required.

3. The wording between square brackets is designed to solicit consideration of whether an authorization or consent could be given outside the guaranty letter or amendment procedure.

4. Variant X, which is modelled on the more elaborate article 9A(3) of the United States proposal, presents an intermediate solution between those presented in Variants Y and Z. It reflects the view that the issuer's authorization is sufficient in itself and thus no further consent is required while any other authorized person such as the confirmer or adviser is merely authorized but not obliged by the authorization contained in the guaranty letter.

5. Variant Y reflects the view that an authorization which is not qualified by such words as "subject to our written consent" binds not only the issuer but also any other authorized person ("transferring bank" in letter of credit parlance) since that person knew and is regarded as having accepted the authorization when, for example, confirming or advising the guaranty letter. However, consideration might be given to softening somewhat the radical solution presented in Variant Y by wording along the following lines: "however, the issuer or other authorized person may not implement or recognize any transfer that would manifestly be contrary to public policy or otherwise unlawful".

6. Variant Z reflects the view that the designation of a guaranty letter as transferable opens the door for transfer requests without, however, obliging any bank to comply with such requests. It is inspired by the interpretation given to article 54 of the Uniform Customs and Practice for Documentary Credits by the Privy Council in its (controversial) decision in Bank Negara Indonesia 1946 v. Lariza (Singapore) Pte Ltd [1988] AC 583.

Article 9 bis. Assignment of proceeds

(1) The beneficiary may assign to another person any proceeds to which it may be [, or may become,] [1] entitled under the guaranty letter.

(2) Variant A If the issuer, or another person obliged to effect payment, has received a notice in a form referred to in paragraph (1) of article 7 of the beneficiary's [irrevocable] assignment, payment to the assignee discharges the obligor [,to the extent of its payment,] [2] from its liability under the guaranty letter.

Variant B An assignment obliges the issuer or other person authorized to effect payment to honour a demand made by the beneficiary in conformity with the terms and conditions of the guaranty letter by payment to the assignee, when the recipient of the demand acknowledges the [notified] assignment in a form referred to in paragraph (1) of article 7; the acknowledgement may be made dependent on an agreement with the beneficiary on procedural and similar points with a view to ensuring certainty of, and to preventing measures conflicting with, the assignment and its implementation [3].

(3) The issuer or other person effecting payment may

Variant X exercise any right of set-off with a claim against the beneficiary within the limits of article 20.

Variant Y invoke towards the assignee any right of set-off referred to in article 20. [4]

Remarks

1. The wording between square brackets is designed to address clearly the situation of an assignment made before the beneficiary demands payment. However, it may be thought that this situation is covered with sufficient clarity by the words "it may be entitled".

2. The reference to the extent of the payment is designed to match the amount of the payment with the extent of the discharge. It may become relevant where the assigned proceeds are less than the amount available under the guaranty letter. Consideration might be given to addressing more directly the question of partial assignment.

3. An illustrative description of the possible points to be regulated in the agreement is provided in comment 1 on article 9B of the United States proposal.

4. Variant X expressly limits the right of set-off to claims against the beneficiary, thus excluding any possible claims against the assignee. Variant Y, like a general proviso such as "subject to the provisions of article 20", does not clearly address that important question.

Article 10. Cessation of effectiveness of guaranty letter

(1) The guaranty letter ceases to be effective when:

(a) the issuer receives from the beneficiary a statement of release from liability in a form referred to in paragraph (1) of article 7;

(b) the beneficiary and the issuer agree on the termination of the guaranty letter [in a form referred to in paragraph (1) of article 7] [1];

(c) Variant A the issuer [, or other person authorized to effect payment,] [2] pays the amount [available] [owed] under the guaranty letter; or

Variant B the issuer pays

(i) the maximum amount as stated in the guaranty letter or as reduced according to an express provision in the guaranty letter that sets forth a clear [and readily workable] method of reduction by a specified or determinable amount on a specified date or upon presentation to the issuer of a required document [3];

(ii) if a part of the maximum amount has previously been paid, the remaining balance;

(iii) if the beneficiary of a guaranty letter [that does not provide for partial demands] [4] demands payment of only part of the maximum amount and consents to the release of the issuer from liability as to the remaining balance, the requested partial amount,

unless the guaranty letter provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness; or

(d) the validity period of the guaranty letter expires in accordance with the provisions of article 11.

(2) The provisions of paragraph (1) of this article apply irrespective of whether any document embodying the guaranty letter is returned to the issuer, and the retention of any such document by the beneficiary does not preserve any rights of the beneficiary under the guaranty letter, unless the guaranty letter stipulates [otherwise] [that it does not cease to be effective without the return of the document embodying it][5].

Remarks

1. Consideration might be given to requiring the form of article 7(1) only for the beneficiary's agreement or consent and to consolidating subparagraphs (a) and (b) along the following lines "the issuer receives from the beneficiary a statement to that effect in a form referred to in paragraph (1) of article 7".

2. The wording between square brackets is intended to solicit consideration of whether the reference to another authorized person should be included, as, for example, done in article 9 bis, in all provisions dealing with payment and payment demands, whether that point should be clarified in a general rule of interpretation, or whether no express clarification is needed in view of general principles of interpretation.

3. The required document would be the one specified in the guaranty letter or, if article 3(1)(b) and (2) were to be adopted, a certification by the beneficiary.

4. The wording between square brackets is geared to the case, referred to at the sixteenth session (A/CN.9/358, para. 127), of a single partial drawing under a stand-by letter of credit that does not permit or envisage partial drawings. It is submitted that the single partial drawing would render the guaranty letter ineffective only if the understanding is that such payment exhausts the guaranty letter. If that analysis is correct there appears to be no reason for limiting the provision to guaranty letters that do not provide for partial drawings.

5. The latter wording between square brackets describes the required substance of any stipulated derogation from paragraph (1). This more elaborate wording would, better than the alternative wording "otherwise", make it clear that, for example, a stipulation merely obliging the beneficiary to return the document would not fall under the proviso.

Article 11. Expiry

The validity period of the guaranty letter expires:

(a) at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the guaranty letter, provided that, if the expiry date is not a business day at the place of business of the issuer, expiry occurs on the first business day which follows [1];

(b) if expiry depends according to the guaranty letter on the occurrence of an event, when the guarantor receives confirmation that the event has occurred by presentation of the document specified for that purpose in the guaranty letter [or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event];

(c) Variant A if the guaranty letter does not contain a provision on the time of expiry, when five years have elapsed from the date at which the guaranty letter had become effective. [2]

Variant B if the guaranty letter states neither an expiry date nor an expiry event, or if a stated expiry event has not yet been established by presentation of the required document, five years after the establishment of the guaranty letter, unless the guaranty letter [is issued in the form of a demand guarantee or bond and] [3] contains an express stipulation of indefinite validity.

Remarks

1. The rule set forth as a proviso is modelled on article 2(2) of the UNCITRAL Arbitration Rules; its application might be expanded to other periods of time that might be included in the final text.

2. It is submitted that Variant A, despite its brevity, covers all situations of stipulations or their absence that are spelled out in Variant B. However, it does not embrace the situation of a stated expiry event that has not been established within five years.

3. The wording between square brackets is designed to exclude stand-by letters of credit from the application of the proviso, as suggested at the sixteenth session (A/CN.9/358, para. 152). Depending on the future number of provisions that the Working Group decides would not be applicable to stand-by letters of credit, consideration might be given to listing all those provisions in one place, probably in the first chapter.